

HAMPSHIRE COUNTY COUNCIL

Decision Report

| | |
|------------------------|--|
| Decision Maker: | Regulatory Committee |
| Date: | 24 July 2019 |
| Title: | Application for a Definitive Map Modification Order to record a Byway Open to All Traffic in Barton on Sea Parish of New Milton |
| Report From: | Director of Culture, Communities and Business Services |

Contact name: Jennifer Holden-Warren

Tel: 01962 845326

Email: Jennifer.holden-warren@hants.gov.uk

Purpose of this Report

1. The purpose of this report is to assist Members in determining whether to accept an application to record a byway open to all traffic in Barton on Sea in the parish of New Milton.

Recommendation

2. That authority is given for the making of a Definitive Map Modification Order to record a footpath with a width varying between 4.3 metres and 4.7 metres, as shown as shown between Points A and B on the attached plan.

Executive Summary

3. This is an application made by a resident of Barton on Sea ('The Applicant') in 2018 under Section 53 of the Wildlife and Countryside Act 1981, to record a Byway Open to all Traffic ('BOAT') in the parish of New Milton. The application is supported by user evidence that the applicant believes demonstrates that a Public Right of Way should be recorded on the basis of long-term use of the claimed route. If granted, the application would record rights for use by all types of public user, including in motor vehicles.
4. An application to record a BOAT along the claimed route was received by Hampshire County Council in 1978. The application was not determined at the time, as a wholesale review of the Definitive Map was being undertaken. This application came to light following receipt of the 2018 application. The evidence of both applications has been reviewed as part of this investigation.
5. Having considered the user evidence, and undertaken additional research of historic documentary evidence, it is considered that there are insufficient

grounds to record the route as a BOAT. However, there is sufficient evidence to recommend that a footpath should be recorded.

Legal framework for the decision

6. WILDLIFE AND COUNTRYSIDE ACT 1981 - Section 53: Duty to keep definitive map and statement under continuous review

(2) As regards every definitive map and statement, the surveying authority shall:

b) ... keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence... of any of [the events specified in sub-section (3)] by order

make such modifications to the map and statement as appear to them to be requisite in consequence of that event.

(3) The events referred to in sub-section (2) are as follows: -

c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows...

(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic;

...

7. HIGHWAYS ACT 1980 - Section 31: Dedication of way a highway presumed after public use of 20 years.

a) Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

b) The period of 20 years...is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice...or otherwise.

8. PRESUMED DEDICATION AT COMMON LAW

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate that way as a highway appropriate to that use, unless there is sufficient evidence to the contrary. Unlike dedication under S.31 Highways Act 1980, there is no automatic presumption of dedication after 20 years of public use, and the burden of proving that the inference arises lies on the claimant. There is no minimum period of use, and the amount of user which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

9. NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006 – Section 66: Restriction on creation of new public rights of way

(1) No public right of way for mechanically propelled vehicles is created after commencement unless it is—

(a) created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for such vehicles, or

(b) created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles.

(2) For the purposes of the creation after commencement of any other public right of way, use (whenever occurring) of a way by mechanically propelled vehicles is to be disregarded.

Section 67: Ending of certain existing unrecorded public rights of way

(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement—

(a) was not shown in a definitive map and statement, or

(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.

(2) Subsection (1) does not apply to an existing public right of way if—

(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles,

(b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense),

(c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,

(d) it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or

(e) it was created by virtue of use by such vehicles during a period ending before 1st December 1930.

(3) Subsection (1) does not apply to an existing public right of way over a way if—

(a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c. 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,

(b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or

(c) before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles—

(i) was reasonably necessary to enable that person to obtain access to the land, or

(ii) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.

Description of the Route (please refer to the map attached to this report)

10. The claimed route commences at the northern end of Farm Lane North, a private, unadopted road in Barton on Sea which is also recorded as a public footpath; continuing in an easterly direction to a junction with Chestnut Avenue. The claimed route is an enclosed, unmetalled track of approximately 58 metres in length, varying between 4.3 and 4.70m wide.

11. The land over which the route runs is owned by a resident of Chestnut Avenue.

Issues to be decided

12. The primary issue to be decided is whether there is clear evidence to show that public rights subsist or are 'reasonably alleged' to subsist. Case law has decided that the burden of proof associated with Map Modification Orders is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map can be made. If there is genuine conflict in the evidence, for example between the evidence of users on the one hand and landowners on the other, an order should be made so that the evidence can be tested at a public inquiry. Officers do not consider that there is such a conflict in this case.

13. If Members are satisfied that this is the case, given that the application seeks to record vehicular rights, they are also asked to consider whether any of the exemptions contained in Sections 67(2) and (3) of the Natural Environment and Rural Communities (NERC) Act 2006 apply to those rights. Although not claimed in this case, evidence discovered as part of this investigation may point to the route having once been a full vehicular highway, and if exemptions under NERC can be shown to apply, the County Council would be under duty to recognise those rights by making an order to record the route as a byway open to all traffic.
14. If a right of way is considered to subsist or reasonably alleged to subsist, then the route, status and width of that way must also be determined, and authority for the making of an Order to record that right on the Definitive Map should be given.
15. Where a Map Modification Order is made, the process allows for objections to the Order to be made. Further evidence could potentially be submitted for examination along with an objection. In these circumstances, the County Council cannot confirm the Order, and the matter would need to be referred to the Secretary of State.
16. Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order. In the event of an application under Section 53 being refused, the applicant has the right to appeal against the County Council's decision to the Secretary of State, who may direct the County Council to make the order that is sought.

Background to the Application

17. The application was submitted in September 2018. Due to a backlog of applications the matter was not taken up for investigation at the time.
18. In June 2018, the land over which the claimed route runs was purchased by an adjacent landowner. The change in ownership and management of the land appears to be the trigger for submission of the 2018 application.
19. In addition to the user evidence forms, the County Council received a number of letters in support of the application. One of these letters was from a long-term resident of Farm Lane North, who stated that an application to record the claimed route as a BOAT was made in 1978. This historic application and the accompanying user evidence forms were subsequently reviewed by the County Council. From an analysis of the correspondence, it would appear that the application was not determined at the time, as a wholesale review of the Definitive Map was being undertaken. However, the status of the route was not revisited, and has remained undetermined. The original applicant did not pursue the outstanding application.
20. For clarity, the 1978 application will hereafter be referred to as 'the 1978 application' and the 2018 application will be referred to as 'the 2018 application'.

Consultations

21. The following people and organisations have been consulted on this application: The Ramblers, The Open Spaces Society, New Forest District Council, New Milton Town Council, The Byways and Bridleways Trust, The CTC, The Trail Riders Fellowship and The Auto Cycle Union. Additionally, the County Council Member for New Milton has been made aware of the application. Where responses were provided, these are set out below.

22. The Ramblers

“The land was used as a private drive to the house in Farm Lane North which is above right to the letter A [on the consultation map]. I believe until 2009. From the map it is a short cut from Lymington road to Farm Lane North for vehicles. The current owner (2017) believes it to be too narrow for vehicles and pedestrians. There are notices saying it is a Private Road. Farm Lane North is a public footpath and not a BOAT.”

Comments by the Landowners

23. The landowner has been consulted on this application. The following points were made:

- The claimed route has only ever been a private driveway, never a public thoroughfare.
- The former owner of the land “regularly remonstrated with trespassers” who used the claimed route.
- The speed of some of the vehicles using the route is “downright dangerous”.
- Farm Lane North is signposted as a cul-de-sac lane.
- Some of the vehicles that have used the claimed route have been too big for the narrow width. It is not possible for some vehicles to pass pedestrians using the path.
- The landowner is content for pedestrians to use the claimed route.

Documentary Evidence

24. Ordnance Survey County Series Maps, 25 inches to 1 mile (1870-1931)

Four maps were published by the Ordnance Survey at a scale of 25 inches to one mile between 1870 and 1931. On the first three editions of the map (circa 1870 and 1908), the claimed route is not shown and the locality is largely uninhabited. On the fourth edition of the map (circa 1930), the claimed route is shown as being of the same nature as Chestnut Avenue or Farm Lane North. However, the surveyors recorded what was visible on the ground; that is, the physical aspects, rather than demarcating what was public and private. Therefore, the recording of the claimed route as a link between Farm Lane North and Chestnut Avenue, does not mean that there were any public rights of access granted at the time the map was produced.

25. Sale plans of plots of land at Barton on Sea (undated, early 20th Century)

These documents relate to the sale of land in Barton on Sea, including on

Chestnut Avenue. The plan for Chestnut Avenue shows the claimed route, with a thin line going across the eastern end of the route where it meets Chestnut Avenue. The line across the entrance to the track may reflect the existence of a gate.

26. Highways Maintenance Map, New Forest Division (c. 1946)

Highway maintenance maps were produced following the responsibility for highways being transferred to county councils; the maps show the highways maintained by the County Council at the time. The claimed route is visible on the base map but is not annotated. This indicates that the claimed route was not being maintained by the County Council at the time the map was produced.

27. Parish Map (c.1952)

Parish maps were prepared by Parish Councils for County Councils when the first Definitive Map was being prepared; the map was produced to inform the County Council of the rights of way in each parish in order for the Draft Definitive Map to be produced. The entire length of Footpath 3, up to the junction with Lymington Road has been annotated in blue ink and labelled '3'. The claimed route is visible on the map but not annotated.

28. The Official Guide to New Milton, Milford-on-Sea, Barton-on-Sea, (c.1958)

The book was produced as a guide to the local area. There is a fold-out map at the back of the book, which shows the claimed route as a continuation of Farm Lane North.

29. Correspondence relating to the 1978 application (1978-1979)

There were a number of letters and memoranda that were sent in relation to the 1978 application. It would appear that the trigger for the submission of the 1978 application was the landowner at the time erecting a gate across the track to prevent access. The applicant made reference in his cover letter to the inconvenience that the gate was causing to the refuse collection vehicle, which had to reverse the length of Farm Lane North in order to make a collection, and also his safety concerns about access for the emergency services should the entrance to Farm Lane North be blocked. Shortly before the application was received, New Milton Neighbourhood Council wrote to New Forest District Council in a letter which was subsequently passed on to Hampshire County Council. The Neighbourhood Council sought clarification about the status of the "footpath" between Chestnut Avenue and Farm Lane North. The response confirmed that the path was not on the Definitive Map. Notably, in the letters exchanged between the councils, the claimed route is always referred to as a 'footpath' and the subject of vehicles using the route was not discussed in this correspondence.

In April 1979, the applicant wrote to the County Council to seek an update. He specifically requested that the claimed route be recorded as a "Road Used as a Public/Path/Byeway [sic] Open to All Traffic".

In June 1979, an internal County Council memorandum reported that a site visit had been conducted, and the officer had met with the landowner. The landowner stated that he had no objection to use of the route by pedestrians and had put up the metal gate posts to narrow the entrance and thereby prevent access to heavy vehicles “because of the frequent damage to his walls on the corner (...) not to hang a gate as alleged.”. The memorandum also pointed out that, creating a BOAT along the claimed route would create the anomaly of having a BOAT that culminated in a footpath (Farm Lane North is only of a footpath status, rather than being a recorded road). The memorandum was signed off with the recommendation that the landowner should not be forced to remove the posts, and the matter should be rested until the claim had been considered.

In February 1979, the County Council wrote to the applicant and stated that the “evidence raises a prima facie case for including this Claimed Right of Way on the draft Definitive Map when it is published in the next year or two.”. Despite this, the claim was never investigated further, as a wholesale review of the Definitive Map was under way – a further letter to the applicant indicates that the Rights of Way team may have been experiencing resourcing issues. The letter concluded that it was County Council policy not to record additional Rights of Way immediately before a review of the Definitive Map was undertaken.

Analysis of the Documentary Evidence

30. None of the documentary evidence provides any indication that the claimed route is public, and the application must therefore be determined based upon evidence of use in recent years. Although there is a range of correspondence surrounding the submission of the 1978 application, the discussion did not culminate in a public right of way being added to the Definitive Map. Whilst there was admission that there was a ‘prima facie case’ for recording the route as a Right of Way, no further investigation or action was taken, and the route was never recorded as a Public Right of Way. The evidence of use under Section 31 of the Highways Act 1980 and common law is considered below.

User Evidence

31. The 1978 application was supported by evidence of 16 people, and the 2018 application was supported by evidence from 24 people. There is no duplication of evidence between the two batches of forms; that is, nobody who completed a form in 2018 had also completed a form in 1978. In both cases, evidence was collected on user evidence forms (‘UEFs’). The dates of use are summarised on the chart at Appendix 1. The table is, by necessity, a generalisation, but it provides an insight into the evidence which has been put forward in support of the application. It is important to note that the UEF changed considerably between the 1978 and the 2018 applications, with the new forms providing a greater level of detail.

32. The evidence charts public use of the claimed route since 1938 up until 2018. 16 forms were completed in 1978 and 24 forms were completed in 2018.
33. Of the total 40 forms that were analysed, 16 users claimed that they had a private right to use the claimed route; 3 individuals in 1978 and 13 individuals in 2018. Exercising a private right cannot be taken into account when considering evidence to record a public right of way, as such use will have been by right, not 'as of right' (a requirement under Section 31 of the Highways Act 1980). The evidence of individuals who claimed to have a private right over the route has therefore been discounted from this analysis. Following 16 forms being discounted, a total of 24 forms have been analysed below.
34. The UEFs from the original application demonstrate that the route has been in regular use, with usage ranging from a maximum of daily use to 50-60 times a year as a minimum. However, it is not possible to identify how much of this use has been in a vehicle, as opposed to on foot, horseback or bicycle, as the original UEF did not request users to stipulate frequency of use by different modes of transport. Notably, eight users stated that they only used the route on foot, meaning that there were only five of the users from the original claim who did not claim a private right along the route and who used the route in a vehicle. Usage on foot cannot be taken into account when considering whether vehicular rights have been acquired along a route.
35. By contrast, the new user evidence forms explicitly ask users how often they use the route by each method, so it is possible to extrapolate a finer degree of detail. All users claimed to use the route both on foot and with a vehicle, and a further five users claimed use on foot, in a vehicle and on bicycle. The UEFs from the new application showed that users indicated regular use of the claimed route by foot and vehicle; the most frequent pedestrian use was four individuals claiming to use the route on a daily basis. The most regular use in a vehicle was four users claiming weekly usage. The individual who stated that they used the route on horseback claimed to do so 'regularly'. There is also frequent claimed use by bicycles; with the most common frequency being two individuals claiming weekly usage.
36. Four of the 1978 UEFs denied that there were any notices onsite. However, eight users acknowledged the presence of notices that had 'recently' been put up. Two users stated that the signs had appeared in 1975 and stated 'Private – no right of way'. From the 2018 application, one user denied that there were any notices or signs along the path. Of the nine users who acknowledged the presence of notices along the route, there was little consensus about what the signs said or when they appeared. Users describe a range of signage, some of which may be the signs that were put up in 1975. 10 users referred to signs put up in June 2018 following the landowner's purchase of the land. Two users described this sign particularly clearly: "Change of ownership. Now owned by 40 Chestnut Avenue. Do not use our drive – find alternative route." And 'Change of ownership. Always been private. No public right of way.'

37. From the 1978 application, no users state that they were challenged by the landowner when using the route. However, in the 2018 application, in response to the question 'Have you ever been told by an owner, occupier or employee that the path was not public?', three users refer to steps taken by the current landowner to prevent use of the claimed route (including the signage discussed above) and challenging people using the path. One user also refers to the previous landowner (who owned the land at the time of the original application), who 'used to stand in [the] path/road and shout at anyone using the lane'.
38. Three individuals from the 1978 application acknowledged that there had been a form of obstruction to the route, with two referring to gate posts at the western end of the route, and one individual referring to the 'shocking condition' of the path. Elsewhere on the form, this individual elaborated and stated that he no longer used the route in a vehicle due to the deteriorated surface, caused by lack of maintenance. On the 2018 application, 10 users referred to obstructions (a parked car or van) by the landowner that prevented vehicles from using the claimed route.

Analysis of the Evidence under Section 31, Highways Act 1980

39. For Section 31 of the Highways Act 1980 to operate and give rise to a presumption of dedication, the following criteria must be satisfied:
- the physical nature of the path must be such as is capable of being a right of way at common law
 - the use must be 'brought into question', i.e. challenged or disputed in some way
 - use must have taken place without interruption over a period of twenty years before the date on which the right is brought into question
 - use must be *as of right*, i.e. without force, without stealth and without permission
 - use must be by the public at large
 - there must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed
40. Physical nature of the route
A public highway must follow a defined route. As the claimed route is enclosed and links a private road to a public road, it does follow a clearly defined route and is therefore capable of being a right of way at common law.
41. The bringing into question of the public's right to use the path
The public's right to use the path can be said to have been brought into question in 1975 when signage was reportedly erected asserting that the track was private, giving a relevant 20-year period under Section 31 of 1955 - 1975.
42. Twenty years' use without interruption
19 users stated that they used the path during the relevant 20-year period of 1955-1975. However, eight of those users claimed to have only used the

route on foot, therefore their evidence is irrelevant to whether vehicular rights can be recorded along the claimed route (although it would support the acquisition of public footpath rights). Furthermore, two users reportedly had a private right to use the route. Three users who did not have a private right to use the route claim to have used the route for the entire duration of the 20-year period.

43. ‘Without force, stealth or permission;

Force – to be as of right, use must not be as the result of the use of force.

The Planning Inspectorate’s *Definitive Map Order Consistency Guidelines* describe the use of force as including “*the breaking of locks, cutting of wire or passing over, through or around an intentional blockage, such as a locked gate.*”

The route is open at both ends and has not been obstructed during the relevant 20-year period. Since the 2018 application was submitted, the landowner has placed wooden bollards along the route to prevent access by motor vehicles; as these were placed after the application was received, they are outside the scope of this investigation and will therefore not be taken into account.

44. *Stealth – to be as of right, use must be open and of the kind that any reasonable landowner would be aware of, if he or she had chosen to look.*

The accounts of users of the path indicate that access to the land was open and without secrecy.

45. *Permission – users as of right should not be using the way with any kind of licence or permissions.*

On the original UEFs, none of the users stated that they had sought permission to use the route, although, as previously discussed, three users claim to have had a private right over the route. On the new UEFs, only one user had sought permission to use the path and was subsequently informed that access was for pedestrians only. The majority of users from the 2018 application acknowledged the existence of a range of signage indicating that the claimed route is private, although two users denied that there was any kind of signage present.

46. Use by the Public

Use must be by the public, and that should be reflected in its volume and the breadth of the type of users.

Use of the claimed route across both the 1978 and the 2018 UEFs is almost entirely by residents of Chestnut Avenue or Farm Lane North. This reflects the number of individuals who claimed to have a private right to use the route; of the total of 40 individuals who completed UEFs across both applications, 16 people claimed that they had a private right to use the track. This means that their evidence cannot be taken into account, as their usage was ‘by right’, not ‘as of right’.

47. *The use must be of a volume that is capable of coming to the attention of a landowner. It should consist of enough users, and the number may reflect the*

setting of a path, such as whether it is in a rural or urban area and the type of use being claimed.

The landowner during the time of the 1978 application was aware of the use of the claimed route; the 'Private – no right of way' signs were put up in 1975, three years before the application was submitted. One of these signs still appears to be present onsite at the western end of the route. Unfortunately, it is not possible to interview the former landowner, and other documents (including memoranda) which refer to the landowner do not provide enough detail to be able to infer, 40 years later, to what extent he was aware of the volume of use of the route. The current landowner purchased the route because of the nature of the use: part of their intention was to make the route safer for pedestrians by preventing vehicles from using the path.

48. *Use of a way should not consist solely of a particular class of person, such as the employees of a particular employer, tenants of a particular landlord, or customers of a particular business, if it is to be recorded as public.*

None of the users indicated that they were related to, employed by, or a tenant of the owner or occupier of the land in question.

49. Summary of user evidence

The evidence of use indicates that local people have been using the route in motor vehicles since 1930. However, 16 individuals (of a total of 40 who completed UEFs in 1978 and 2018) have indicated that they have a private right to use the claimed route and their evidence therefore cannot be taken into account when considering recording a public right of way. In 1975, signage indicating that the route was private was displayed onsite. Some form of such signage has appears to have been continuously displayed onsite since that time. Both the former and the current landowner have taken steps to protect the claimed route from trespass, including challenging users and creating obstructions to prevent use by motor vehicles. There has been considerable use of the claimed route by pedestrians since the 1930s, and the evidence of eight individuals from the 1978 application was solely pedestrian usage and therefore cannot be taken into account when considering recording a BOAT.

50. Actions of the landowner

The land was initially owned by a resident of Farm Lane North. Following his death, the land entered the ownership of two members of his family. The land was then purchased by a resident of Chestnut Avenue in 2018. The new owner has stated that the family members of the former owner offered to sell the land to the residents of Farm Lane North collectively, but the offer was declined.

There is evidence on the UEFs that the original landowner challenged people who used the route. Two users state that a 'Private – No right of way' sign was put up in 1975. A sign bearing the same wording was visible when a site visit was conducted in April 2019; the sign appeared to have been in situ for a

considerable period and it seems likely that it is the same sign that was erected in 1975.

Following purchase of the land in June 2019, the new owner displayed signs on the route stating “The land has always been PRIVATE WITH NO PUBLIC RIGHTS OF WAY OR ACCESS. We please respect [sic] that you find an alternative route.”

Actions of the owner that have been carried out after the 2018 application was received have not been taken into account, as these are outside the scope of this investigation; this includes the construction of wooden bollards to prevent access by vehicles.

51. Conclusions under Section 31, Highways Act 1980

Analysing the evidence reviewed above, the conclusion reached is that the provisions of s31 of the Highways Act (1980) have not been satisfied for recommending that a BOAT be recorded: the majority of those individuals who claimed to have used the route in a vehicle, claimed to have a private right to do so, and there is evidence that the landowner challenged users of the claimed route. Additionally, signage asserting that the claimed route is not a Public Right of Way has been clearly displayed onsite since at least 1975. Although there is a clear 20-year period of use from an event which called use of the route into question (in this case, the displaying of ‘Private – no right of way’ signage), much of this use was either solely on foot or by users who had a private right to use the route; only five users who did not meet either of these conditions used the route during the 20-year period. Given the densely populated locality, use by five individuals is not highly representative of the local area.

However, although there is insufficient evidence to recommend recording a BOAT under s31 of the Highways Act, there has been a substantial amount of usage by pedestrians, both before, during, and after the 20-year period. The current landowner is acquiescent with the claimed route being used by pedestrians and has therefore not challenged individuals using the route on foot. Additionally, the former owner indicated to a County Council officer that he was happy for pedestrians to use the route (this suggests that where he challenged people using the route, it was only motorised vehicle users that were challenged). If s31 was to be considered in relation to recording the claimed route as a footpath, it is considered that there would be sufficient evidence to record the route as a public footpath, as there were 13 people using the path on foot during the relevant period (excluding the three users who had a private right to use the route). Moreover, recent pedestrian use has not been challenged.

52. Analysis of the evidence under Common Law

This matter can also be considered at common law. For a claim to succeed at common law, the onus is on the applicant to show that the owners were aware of, and acquiesced in, the use of a route by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express act of dedication, or it may be implied

from a sufficient period of public use without secrecy, force or permission, and the acquiescence of those landowners in that use. This is required in order to meet the two pre-conditions for the creation of a highway - that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient user is not fixed under common law, and depends on the facts of the case. The user must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as putting up a physical barrier, erecting notices stating that the route is not a public right of way of the type being claimed, or turning people back. The more notorious the use, the easier it will be to infer dedication.

53. Conclusions under Common Law

Unlike Section 31, the total period spanned by the user evidence can be considered. The user evidence indicates that there has been use of the claimed route in vehicles since 1930 until the submission of the 2018 application. However, it is not possible from the original UEFs to ascertain how regular use in vehicles has been, as opposed to other means. Moreover, as the former landowner is deceased, it is not possible to consult him about management of the claimed route, or intentions with regards to making the route public, although the documentary evidence indicates that he did not object to use of the route by pedestrians. It seems likely that the owner had no intention of dedicating a public route, as the 'Private – no right of way' signage was put up in 1975, before the DMMO application was submitted. Furthermore, two users in the 2018 evidence refer to the former landowner shouting at people using the claimed route.

It is considered that the evidence of use of the claimed route is insufficient for a deemed dedication of a BOAT to be inferred at common law. However, as both the former and the current landowner has acquiesced in use of the claimed route by pedestrians, and there has been consistent pedestrian usage since the 1930s, there is sufficient evidence to record a footpath under Common Law.

54. Analysis of the Evidence under Natural Environment and Rural Communities Act (2006)

There remains to be considered whether motorised vehicular rights have been extinguished by the Natural Environment and Rural Communities Act (NERC). Such rights will have been extinguished unless one of eight exceptions contained within Sections 67(2) and 67(3) of the Act applies. These exceptions are set out and examined in turn below.

Section 67(2) – rights for mechanically-propelled vehicles will not have been extinguished on an existing public right of way if:

(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles.

Signage was erected in 1975 that stated that the claimed route was private and not a right of way; therefore, any usage after this time was an act of trespass and cannot be taken into account. Moreover, it is not possible to identify

whether use by motor vehicles has been the most common method of travel in the five years leading up to the introduction of NERC.

- (b) ***immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c.66) (list of highways maintainable at public expense).***

The route was not recorded on the Definitive Map on 2nd May 2006, nor was it recorded on the List of Streets on this date.

- (c) ***it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles.***

The claimed route was created as private access to a property in Farm Lane North. There is no evidence to indicate that it was expressly created as a right of way for use by motor vehicles.

- (d) ***it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles.***

Although the route appears to have been constructed as a road specifically for motorised vehicles, it was created solely for private use. There is no evidence to indicate the basis for the route's creation.

- (e) ***it was created by virtue of use by such vehicles during a period ending before 1st December 1930.***

The earliest recorded use of the route is in 1930. Despite research, no historical evidence about specifically when the route came into being has been discovered, although it has been ascertained that the route was created as private access to a property in Farm Lane North. It has not been possible to identify whether the primary usage in and around 1930 was by motorised vehicle, or by another mode of transport. Given the uncertainty of the origins of the claimed route, it is not possible to state that Motorised Vehicle rights would have been established by December 1930.

The exceptions in Section 67(3), which require that the application to record the route as public be made to the County Council prior to 20th January 2005, do not apply in this case.

55. Conclusions under Natural Environment and Rural Communities Act (2006)

As the criteria set out above have not been satisfied, any motorised vehicle rights that may have previously existed along this path (for example, as a result of the application that was not determined in 1978), will have been extinguished by the powers of the NERC Act.

Conclusions

56. Although there has been consistent use of the claimed route since 1930, there is insufficient evidence to recommend recording the claimed route as a BOAT under s31 of the Highways Act, or under the provisions of Common Law.

57. Since 1975, signage stating that the claimed route is private has been clearly displayed onsite. Additionally, both the former and the current landowner have taken steps to protect the land from trespass, including challenging users, and creating obstructions to prevent access by motor vehicles. Furthermore, a substantial number of users either had a private right to use the route (and their evidence is thus inadmissible in recording a public right of way), or indicated use on foot only, which is irrelevant to recording a BOAT.
58. The NERC Act (2006) extinguished any motorised rights that may have existed along this route, as the criteria have not been satisfied.
59. Although there is insufficient evidence to recommend that a BOAT be recorded, there is sufficient evidence under both s31 of the Highways Act, and under Common Law to recommend recording a footpath along the claimed route. Both the former and the current landowners have been acquiescent in allowing pedestrians to use the path.

REQUIRED CORPORATE AND LEGAL INFORMATION:

Links to the Strategic Plan

| | |
|---|-----|
| Hampshire maintains strong and sustainable economic growth and prosperity: | yes |
| People in Hampshire live safe, healthy and independent lives: | yes |
| People in Hampshire enjoy a rich and diverse environment: | yes |
| People in Hampshire enjoy being part of strong, inclusive communities: | yes |

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

Document

Claim Reference: Case File (CR/1228)

Location

Countryside Access Team
Castle Avenue
Winchester
SO23 8UL

EQUALITIES IMPACT ASSESSMENT:

1. Equality Duty

The County Council has a duty under Section 149 of the Equality Act 2010 ('the Act') to have due regard in the exercise of its functions to the need to:

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited by or under the Act with regard to the protected characteristics as set out in section 4 of the Act (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation);
- Advance equality of opportunity between persons who share a relevant protected characteristic within section 149(7) of the Act (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic within section 149(7) of the Act (see above) and persons who do not share it.

Due regard in this context involves having due regard in particular to:

- The need to remove or minimise disadvantages suffered by persons sharing a relevant protected characteristic that are connected to that characteristic;
- Take steps to meet the needs of persons sharing a relevant protected characteristic that are different from the needs of persons who do not share it;
- Encourage persons sharing a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

2. Equalities Impact Assessment:

See guidance at <http://intranet.hants.gov.uk/equality/equality-assessments.htm>

Insert in full your **Equality Statement** which will either state:

- (a) *why you consider that the project/proposal will have a low or no impact on groups with protected characteristics or*
- (b) *will give details of the identified impacts and potential mitigating actions*